STATE OF MICHIGAN

COURT OF APPEALS

RANDEL & ASSOCIATES, P.C., a/k/a
DICKSON RANDEL & COMPANY, P.C.,

Plaintiff/Counter-Defendant-
Appellee,

v

ZERBO MULLIN & ASSOCIATES, P.C.,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellant,

and

ZERBO CONSULTING GROUP, P.C.,

Third-Party Plaintiff-Appellant,

and

MICHAEL RANDEL and SAMUEL P. RAGUSO,

Third-Party Defendants-Appellees.

UNPUBLISHED
September 15, 2009

No. 274753
Oakland Circuit Court
LC No. 2005-069593-CK

RANDEL & ASSOCIATES, P.C., a/k/a
DICKSON RANDEL & COMPANY, P.C.,

Plaintiff/Counter-Defendant-
Appellee,

v

ZERBO MULLIN & ASSOCIATES, P.C.,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellant,

and

No. 279159
Oakland Circuit Court
LC No. 2005-069593-CK

ZERBO CONSULTING GROUP, P.C.,

Third-Party Plaintiff,

and

MICHAEL RANDEL and SAMUEL P. RAGUSO,

Third-Party Defendants.

Before: Gleicher, P.J., and K.F. Kelly and Murray, JJ.

PER CURIAM.

In Docket No. 274753, defendant Zerbo Mullin & Associates, P.C. ("Zerbo Mullin") appeals as of right from the circuit court's final order resolving all claims in this dispute involving an agreement for the sale and purchase of an accounting practice.[1] Zerbo Mullin challenges the trial court's earlier order denying its motion for summary disposition and granting summary disposition in favor of plaintiff Randel & Associates, P.C. ("plaintiff") and third-party defendant Michael Randel ("Randel") pursuant to MCR 2.116(C)(10). In Docket No. 279159, Zerbo Mullin appeals as of right the trial court's judgment awarding attorney fees and costs in favor of plaintiff. We affirm in part, and reverse in part.

I. Material Facts

This case arises out of an agreement involving the sale and purchase of an accounting practice. At the time relevant to this case, plaintiff owned an accounting practice in Royal Oak, and Randel was its sole shareholder and president. John Zerbo was working in private practice through his firm, Zerbo Consulting Group, P.C., and Mark Mullin was looking to reenter private practice. John Zerbo and Mullin together decided to purchase an existing accounting practice separate from Zerbo Consulting and created Zerbo Mullin.

In 2004, Randel retained Harlan Freeman, a broker specializing in the sale of accounting firms, to sell plaintiff's accounting practice. Freeman approached Mullin regarding the practice, and the parties reached an agreement that required Zerbo Mullin to pay more than $500,000 cash at closing. Zerbo Mullin obtained a conditional letter of commitment from "the lender," whereby the lender agreed to loan Zerbo Mullin $615,000. The letter of commitment indicated that a promissory note for $228,000 payable to Samuel Raguso would be issued for the buyout of Raguso's interest in Zerbo Consulting. Raguso had previously loaned money to John Zerbo and

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[1] We note that although Zerbo Consulting Group, P.C. ("Zerbo Consulting") is also listed as an appellant along with Zerbo Mullin on the claim of appeal, the issues raised in Docket No. 274753 do not involve Zerbo Consulting.

invested money in Zerbo Consulting, in which he owned a one-third interest. As a condition of the lender's loan to Zerbo Mullin, the lender required that the promissory note to Raguso be subordinate to Zerbo Mullin's debt to the lender. As such, the lender required that Raguso sign a subordination agreement.

Raguso learned in January 2005 that John Zerbo and Mullin were planning on forming a new business. In April 2005, when Raguso's attorney learned of a proposed transfer of all of Zerbo Consulting's assets to Zerbo Mullin, he filed a UCC-1 Financing Statement against John Zerbo, Zerbo Consulting, and Zerbo Mullin to protect Raguso's interests.

On April 27, 2005, plaintiff and Zerbo Mullin entered into an agreement for the sale and purchase of the accounting practice ("the purchase agreement"). The purchase price was $675,000, of which $575,000 was to be paid in cash at closing. The remaining $100,000 was to be paid pursuant to a promissory note over the next five years. Regarding the closing date, the purchase agreement stated that the closing shall occur "on or before _____, 2005, or at such other time or at such other place as may be agreed upon by the parties[.]"

On the same day, plaintiff and Zerbo Mullin entered into an escrow agreement pursuant to which Zerbo Mullin deposited $10,000 into an escrow account as a deposit for the accounting practice. The escrow agreement provided that the deposit was refundable only for certain enumerated reasons, including in the event that Zerbo Mullin terminates the purchase agreement within 21 days after its execution.

According to an April 27, 2005, letter to Richard J. Alef, Zerbo Mullin's attorney, from Eric T. Weiss, counsel for plaintiff and Randel, the parties contemplated closing the deal soon after they signed the purchase agreement. The letter indicated that Weiss prepared or revised a promissory note in anticipation of the closing and stated that the note was dated May 1, 2005, but that the date can be changed to the actual closing date once that date is known. The letter also states that Alef's "clients indicated they expected to [be] able to close near the end of next week."

The e-mail correspondence between the parties and their agents indicates that several closing dates were contemplated, including May 3, 2005, and May 9 through 11, 2005. On May 18, 2005, Weiss sent a letter to Alef, which reflected the status of the deal on that date. The letter stated:

> I spoke with Mike Randel yesterday regarding your request to extend the 21-day financing contingency described in Section 5 of the Purchase Agreement and Section 1 b of the Escrow Agreement. I should note that your request came as quite a surprise to [Randel] who, contrary to your understanding, was not aware of the problem involving the UCC lien which you explained in our telephone conversation on Monday, May 16th, and which I will restate below.
>
> You mentioned that an individual named Sam filed a UCC lien against John Zerbo's entity, Zerbo Consulting. You further mentioned that Sam recently filed a UCC lien against Zerbo Mullin & Associates, P.C. (hereafter "Zerbo Mullin") even though this entity owed no obligation to Sam. You further claim that it is Zerbo Mullin's position that the UCC lien filed against it is improper.

Furthermore, Zerbo Mullin's lender, who will be financing the acquisition of Mike Randel's accounting practice, will not finance the acquisition until the UCC lien against Zerbo Mullin is terminated which Sam will not do voluntarily.

You further mentioned that you believe your clients will form a new entity for purposes of acquiring Mike Randel's accounting practice, which entity will be unknown to Sam and, as such, there will be no UCC lien attached to this entity. Furthermore, the lender finds this resolution acceptable.

Based on the above, Mike Randel is willing to extend the due diligence period in section 1 b of the Escrow Agreement by seven (7) days. As the agreement currently provides, your clients may terminate within 21 days of April 27, 2004 [sic, 2005] or else the Deposit becomes non-refundable. The last date for the Deposit to be refundable is today, May 18, 2005. With Mr. Randel's granting of a seven (7) day extension, the Deposit shall be refundable through May 25, 2005. Thereafter, the Deposit shall be non-refundable.

I would ask you to obtain your clients' acceptance by having them execute this letter and returning a copy via facsimile to me by the end of business today, if possible. I will then obtain the signature of Mike Randel and fax it back to you. By executing this letter, they agree that (I) the financing contingency is the only remaining contingency, (II) the Deposit will be refundable through May 25, 2005, but only to allow them to satisfy their financing contingency and not for any other reason and, thereafter, the Deposit will be non-refundable for any and all reasons, and (III) there will be no further extensions.

This extension is based solely on our understanding of the representations you made in our telephone conversation on Monday which I restated above. By executing this letter, your clients further acknowledge that the information stated above is true to the best of their knowledge and understand that my client is relying on these representations in granting the requested extension.

You indicated your clients would be ready to close this Monday, May 23, 2005. Mr. Randel is unavailable that day but suggests, as an alternative, Tuesday, May 24, 2005 or Wednesday, May 25, 2005.

Meanwhile, Zerbo Mullin negotiated with Raguso in an attempt to resolve the UCC issue and explored financing from a different lender. The other lenders, however, also required that the UCC lien be discharged before closing. In an April 28, 2005, letter from Raguso's attorney to John Zerbo, Raguso demanded that the $228,000 owed to Raguso be paid in full. In an April 29, 2005, letter to Raguso's attorney, counsel for Mullin demanded that Raguso immediately release the lien against Zerbo Mullin, stating that because Raguso had no relationship with Mullin, Raguso cannot properly file a UCC lien against Zerbo Mullin, of which Mullin is a 50-percent shareholder.

In a May 27, 2005, letter to Raguso's attorney from Paul K. Villarruel, Zerbo Mullin's other attorney along with Alef, Villarruel stated that Raguso's UCC lien was improperly filed against John Zerbo, Zerbo Consulting, and Zerbo Mullin. Villarruel further stated that Zerbo

Mullin was preparing to close on the purchase agreement and that the lien seriously jeopardized the transaction. According to Villarruel, unless Raguso immediately removed the lien, the transaction could not proceed. Villarruel demanded that Raguso release the lien within two days, i.e., May 29.

In a second letter from Villarruel to Raguso's attorney, dated June 1, 2005, Villarruel again asserted that Raguso's filing of the UCC lien was "unlawful, fraudulent and unconscionable," and, critical to this case, further stated:

> Your client's unlawful lien filings will cause financing that [Zerbo Mullin] has arranged not to close. If that happens, not only will [Zerbo Mullin] lose all fees and costs it has paid to obtain such financing, your client is well aware that [Zerbo Mullin] is depending upon a significant portion of those loan proceeds to purchase the accounting practice of a third party. *If these transactions do not close on Friday, June 3, 2005, this opportunity will be lost.* [Emphasis added.]

Thereafter, in a June 9, 2005, letter from Weiss to Alef, Weiss indicated that the deal had not been completed as a result of Zerbo Mullin's failure to obtain financing. Weiss recalled that Alef had telephoned him on May 20, 2005, and indicated that the closing would occur on June 1, 2005. Weiss further indicated that on May 26, 2005, Alef left a message delaying the closing until June 3, 2003. According to Weiss, he telephoned Alef on June 2, 2005, and was informed that the issue involving Raguso was not yet resolved, and the lender would not finance the transaction. Weiss indicated in his letter that Randel had been ready and willing to close since early May when the closing date was first discussed. Finally, Weiss stated that, unless he heard otherwise before June 15, 2005, he would release the $10,000 escrow deposit to plaintiff as liquidated damages.

In response to Weiss's letter, Alef indicated that Zebra Mullin's inability to close the transaction was not because of a lack of due diligence and that alternate financing was being pursued. Alef stated that the "deal can still be secured" and that "the deal is turn key once this last detail is established."

On June 22, 2005, Alef wrote to John Zerbo, Raguso, and Mullin, and indicated that he was acting as an intermediary to settle the UCC dispute. Alef stated that he had in his possession an executed promissory note from Zerbo Consulting to Raguso, a personal guaranty from John Zerbo and Mullin, cancelled notes that may be necessary to close on the purchase agreement, a redemption agreement, a mutual release agreement, and a UCC termination. Alef stated that he was acting as the escrow agent regarding the UCC dispute and that he would hold the above documents in escrow, with the exception of the UCC termination, which was needed to close the purchase agreement.

In a June 23, 2005, letter to Weiss, Alef indicated that the problem involving Raguso was now resolved and that he hoped that Randel would "come back to the table and consummate this deal."

In response, Weiss indicated that Randel was willing to consider a deal with Zerbo Mullin but that the April 27, 2005, purchase agreement terminated as a result of Zerbo Mullin's failure to satisfy the financing contingency. Weiss indicated that Randel did not object to the

June 3, 2005, closing date based on Alef's representation that the loan officer was taking an extended Memorial Day vacation. Weiss further stated:

> So, arguably, the last agreed upon closing date was June 3rd. As you will recall, I telephoned you on June 2nd and you stated that the closing would not take place on June 3rd. No requests for extensions were made and none were granted.
>
> * * *
>
> [Randel] was ready, willing and able to close this deal anytime after April 27, 2005 through the extended closing date of May 25, 2005 and even at the close of the following week, through June 3rd.
>
> * * *
>
> It is now July 5, 2005. My client has heard from Harlan Freeman [the broker] that a *new deal* has been proposed to increase the purchase price based on my client's increased client base.
>
> * * *
>
> The agreement of April 27, 2005 is dead as a result of your client's failure to obtain financing within the agreed upon time frame. If your clients are able to obtain financing, you may feel free to propose a new deal to acquire Mike Randel's accounting practice for his consideration. [Emphasis added.][2]

In an August 2, 2005, letter to Weiss, Alef stated that John Zerbo and Mullin "have take[n] the position that the closing is still viable and contractually valid." Alef indicated that the closing was scheduled for August 5, 2005, at his office. In an August 4, 2005, letter, Weiss reiterated the circumstances discussed in his previous letters and reiterated his belief that there was no valid agreement pending. Weiss stated that Randel would not be attending the "unilaterally scheduled closing on August 5th, 2005."

II. Trial Court Proceedings

On October 3, 2005, plaintiff filed a complaint for declaratory relief against Zerbo Mullin seeking, inter alia, a declaration that it is entitled to retain the escrow deposit. Zerbo Mullin filed

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[2] On approximately July 22, 2005, Weiss sent Alef a mutual release and asked that John Zerbo and Mullin sign the release. The release indicated that the agreement terminated as a result of Zerbo Mullin's inability to obtain financing and that the parties agreed that plaintiff should retain the $10,000 deposit as liquidated damages.

a counterclaim against plaintiff and a third-party claim against Randel alleging breach of contract and requesting a declaration that Zerbo Mullin was entitled to the $10,000 held in escrow. Zerbo Mullin and Zerbo Consulting also filed a third-party complaint against Raguso alleging tortious interference with a contractual relationship, tortious interference with a business relationship or expectancy and requesting damages as a result of the UCC Financing Statement. Raguso then filed a counterclaim against Zerbo Mullin and Zerbo Consulting, alleging breach of contract, breach of fiduciary duty, fraudulent conveyance, fraudulent misrepresentation, innocent misrepresentation, and violation of MCL 450.1489. On December 5, 2005, Zerbo Mullin and Zerbo Consulting filed an amended third-party complaint against Raguso adding claims for breach of contract, promissory estoppel, unjust enrichment, and fraud.

Relevant to this appeal, plaintiff and Randel filed a motion for summary disposition pursuant to MCR 2.116(C)(10) against Zerbo Mullin on Zerbo Mullin's counterclaim for breach of contract. Plaintiff and Randel argued that the parties' actions and extrinsic evidence established that they agreed to a closing date no later than June 3, 2005, and that Zerbo Mullin's inability to close by that date constituted a default under the purchase agreement. Plaintiff and Randel also argued that a reasonable closing date did not extend beyond June 9, 2005, the date of Weiss's letter declaring that the deal had terminated. Plaintiff and Randel further argued that even if August 5, 2005, was a reasonable closing date, the evidence showed that Zerbo Mullin was not ready to close on that date.

On August 9, 2006, Zerbo Mullin filed a response and requested summary disposition in its favor pursuant to MCR 2.116(I)(2). Zerbo Mullin argued that no genuine issue of material fact existed that it attempted to perform within a reasonable time. It contended that plaintiff and Randel refused to close after Zerbo Mullin received the financing documents from the lender. Alternatively, Zerbo Mullin argued that the trial court should find that there existed a genuine issue of material fact regarding whether there was an agreed-upon closing date and whether Zerbo Mullin was ready to perform within a reasonable time.

In an October 10, 2006, opinion, the trial court determined that the purchase agreement and escrow agreement were ambiguous regarding the closing deadline, but that no factual dispute existed that the parties agreed to a June 3, 2005, deadline. The court opined that Alef's deposition testimony and the May 18, 2005, letter established that the parties agreed to a May 25, 2005, closing date that was subsequently extended to June 3, 2005. The court stated that the June 1, 2005, letter to Raguso and subsequent responses to Weiss's letters supported its conclusion. The court determined that the parties' conduct was inconsistent with that asserted in John Zerbo's and Mullin's affidavits and established the agreement beyond factual dispute. Thus, the trial court granted summary disposition for plaintiff and Randel on Zerbo Mullin's counterclaim. The court also granted in part Raguso's motion for summary disposition regarding Zerbo Mullin and Zerbo Consulting's claims against Raguso and ruled that plaintiff is entitled to retain the $10,000 escrow deposit. On November 1, 2006, the trial court entered a judgment in accordance with its opinion.

Thereafter, plaintiff and Randel filed a motion for costs and attorney fees against Zerbo Mullin, John Zerbo, and Mullin for filing a frivolous answer and counterclaim. MCL 600.2591. Plaintiff and Randel argued, inter alia, that Zerbo Mullin failed to disclose that its lender required Raguso to subordinate the debt owed to him and that Raguso refused to do so. Plaintiff and Randel also argued that Zerbo Mullin acted in bad faith and that its assertion that it was able to

close on August 5, 2005, was false and designed solely to generate a counterclaim against plaintiff and Randel.

The trial court issued an opinion ruling that Zerbo Mullin's legal position was frivolous pursuant to MCL 600.2591(1) because the evidence showed that the parties had agreed to a June 3, 2005, closing date. On June 13, 2007, the trial court entered a judgment in favor of plaintiff[3] and against Zerbo Mullin in the amount of $63,547.34.

III. Analysis

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no material factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31. A "trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000). Further, whether the terms of a contract are ambiguous is a question of law that we review de novo. *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 166; 721 NW2d 233 (2006).

A. The Merits

In interpreting a contract, this Court's obligation is to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). We must examine the language of the contract and accord words their ordinary and plain meanings if such meanings are apparent. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). If the language is unambiguous, courts must interpret and enforce the contract as written. *Quality Products, supra* at 375. "Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id.*

We agree with the circuit court that there was no genuine issue of material fact that a closing date of June 3, 2005, was agreed upon, and that Zerbo Mullin failed to perform by that date. The agreement states that the closing shall occur "on or before _____, 2005, or at such other time or at such other place as may be agreed upon by the parties[.]" Although the agreement plainly shows the parties' intent that the agreement not provide a specific closing date, the evidence indisputably shows that the parties agreed on general closing dates in May, that the date was ultimately extended to June 3, 2005.

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[3] Although both plaintiff and Randel filed the motion for costs and attorney fees, the judgment entered pursuant to the motion granted costs and attorney fees in favor of plaintiff only.

We first turn to the parties' intentions about closing immediately after the purchase agreement was signed. The evidence shows that although the parties did not set a specific closing date when they executed the agreement on April 27, 2005, they contemplated that the closing occur within a few weeks thereafter. In fact, Zerbo Mullin's attorney, Richard Alef, testified that he informed Randel during negotiations that John Zerbo and Mark Mullin wanted to close "the sooner, the better" and that Alef anticipated that the closing would occur shortly after the purchase agreement was signed. Several e-mails and other correspondence reveal that the parties discussed several closing dates, but that the closing was repeatedly postponed. Alef admitted that the parties discussed tentative May 2005 closing dates after the purchase agreement was executed.

Eric Weiss's May 18, 2005, letter to Alef reveals that Randel granted Zerbo Mullin a seven-day extension of the period during which Zerbo Mullin's $10,000 deposit was refundable. The escrow agreement provided that the deposit was refundable only for 21 days, which was May 18, 2005, the date of Weiss's letter. Contrary to Zerbo Mullin's argument that the closing was not scheduled for May 18, 2005, Alef testified that May 18, 2005, was selected as the date for closing because it "tied into" the escrow agreement and that Alef requested that the date be postponed because of the UCC issue involving Samuel Raguso. Alef testified that the closing was then scheduled for seven days later, May 25, 2005, in accordance with Randel's seven-day extension, but that the issue involving Raguso was still not resolved at that time. Alef admitted that he then requested another extension.

When asked whether the parties thereafter agreed to a closing on or about June 3, 2005, Alef responded, "It sounds about right." Correspondence from Weiss to Alef confirms that the parties had agreed to close on June 3, 2005. Further, in a June 1, 2005, letter from Villarruel to Raguso's attorney, Villarruel stated that if Zerbo Mullin was unable to obtain the necessary financing on June 3, 2005, the opportunity to purchase the accounting practice "will be lost." Alef admitted that the issue involving Raguso still had not been resolved as of June 3, 2005.

In addition, the correspondence exchanged after June 3, 2005, indicated that the deal had terminated. In a June 9, 2005, letter from Weiss to Alef, Weiss indicated that he intended to release the $10,000 in escrow to plaintiff as liquidated damages for Zerbo Mullin's breach of contract. In a June 23, 2005, letter from Alef to Weiss, Alef stated that he was "hopeful that [Weiss's] client will come back to the table and consummate this deal." Further, in an August 4, 2005, letter to Alef, Weiss recounted a conversation that occurred in late June 2005, in which Alef indicated that Zerbo Mullin would have financing by July 1, 2005, if plaintiff was willing to consider "a new deal."

Therefore, the evidence shows that the parties agreed to several closing dates and that plaintiff granted Zerbo Mullin several extensions, and that the latest date agreed upon as an extension was June 3, 2005. Although the affidavits of Zerbo and Mullin state that August 5, 2005, was the only firm closing date, the evidence discussed, even when viewed in Zerbo Mullin's favor, establishes otherwise. Thus, no genuine issue of material fact existed that Zerbo Mullin was granted extensions to June 3, 2005, and was still unable to perform under the purchase agreement.

It is true, as Zerbo Mullin contends, that when a contract is silent regarding the time for performance, a reasonable time is presumed without reference to parol evidence. See *Walter*

Toebe & Co v Dep't of State Hwys, 144 Mich App 21, 31; 373 NW2d 233 (1985). The parol evidence rule, however, does not preclude consideration of events that occurred after the formation of the agreement.

> The parol evidence rule may be summarized as follows: parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous. [*Hamade*, *supra* at 166 (quotation marks and citations omitted).]

The parol evidence rule does not speak to negotiations or agreements that occur after the formation of a contract. Thus, the trial court was not precluded from considering the parties' correspondence and communications that occurred after the execution of the purchase agreement in determining whether Zerbo Mullin performed within a reasonable time.

Zerbo Mullin also argues to us–though it did not to the trial court–that any agreement Alef may have made regarding a closing date is irrelevant because Alef did not have authority to bind Zerbo Mullin. Because this issue is unpreserved, our review is limited to plain error affecting substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

This argument is premised upon Alef's deposition testimony that he was retained to draft the sale documents, was not retained to negotiate the closing, and clearly was not granted authority to negotiate the closing date. "[A]n attorney often acts as his client's agent, and his authority may be governed by what he is expressly authorized to do as well as by his implied authority." *Uniprop, Inc v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004). Generally, "a principal is bound by an agent's actions within the agent's actual or apparent authority." *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001).

The response that Alef gave during his deposition, however, establishes only that Zerbo and Mullin approached Alef to draft the sale documents when Alef first became involved in the matter. Other documentary evidence and Alef's other deposition testimony establishes that Alef assumed a very active role in attempting to resolve the Raguso issue and close the sale between plaintiff and Zerbo Mullin. Zerbo Mullin has produced no evidence showing that Alef was not authorized to negotiate a closing date, and summary disposition would have been appropriate had Zerbo Mullin raised this issue below. See *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). Accordingly, Zerbo Mullin has not established a plain error affecting its substantial rights.

Zerbo Mullin's final argument in Docket No. 274753 is that the trial court improperly relied on the June 1, 2005, letter from Villarruel to Raguso's attorney because it was a statement regarding settlement negotiations deemed inadmissible under MRE 408. Because Zerbo Mullin raises this issue for the first time in this Court, our review is limited to plain error affecting substantial rights. *Veltman*, *supra* at 690.

A court should consider only substantively admissible evidence in analyzing a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). MRE 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. *This rule also does not require exclusion when the evidence is offered for another purpose*, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [Emphasis added.]

As noted already, the June 1, 2005, letter stated, "If these transactions do not close on Friday, June 3, 2005, this opportunity will be lost." This is not a statement attempting to compromise a claim. Rather, and as Zerbo Mullin acknowledges, the trial court relied on the statement for what is was–establishing a June 3, 2005, closing date. Because the trial court did not rely on the letter as establishing liability or the invalidity of a claim as contemplated under MRE 408, it was not inadmissible under that rule. Accordingly, the trial court did not err by granting summary disposition for plaintiff and Randel and denying summary disposition for Zerbo Mullin.

B. Sanctions

In Docket No. 279159, Zerbo Mullin argues that plaintiff and Randel's motion for costs and attorney fees pursuant to MCL 600.2591 was untimely. A trial court has discretion to determine whether a motion under MCL 600.2591 was timely filed, and we review that decision for an abuse of discretion. *In re Attorney Fees & Costs*, 233 Mich App 694, 699; 593 NW2d 589 (1999). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Zerbo Mullin argues that plaintiff and Randel were required to file their motion before the trial court dismissed the action on November 13, 2006. Zerbo Mullin relies on *In re Attorney Fees & Costs, supra*, *Maryland Cas Co v Allen*, 221 Mich App 26; 561 NW2d 103 (1997), and *Antonow v Marshall*, 171 Mich App 716; 430 NW2d 768 (1988), in support of its argument. The rule requiring that a motion be filed before dismissal, however, pertains to motions for sanctions pursuant to MCR 2.114(D) and (E), and not to motions under MCL 600.2591. *Maryland Cas Co, supra* at 30; *Antonow, supra* at 717-719. "While MCR 2.114 covers sanctions for filing frivolous documents, MCL 600.2591 . . . covers sanctions for the filing of frivolous actions or defenses." *Maryland Cas Co, supra* at 30. Thus, plaintiff and Randel were not required to file their motion before the trial court dismissed the action.[4]

[4] Zerbo Mullin also argues that plaintiff and Randel were required to present a bill of costs within 28 days after the trial court entered the October 10, 2006, order pursuant to MCR (continued…)

"When costs are awarded pursuant to MCL 600.2591 . . . the appropriate standard for determining whether the motion for costs is timely is whether the motion was filed within a reasonable time after the prevailing party was determined." *In re Attorney Fees & Costs, supra* at 699. The trial court granted summary disposition for plaintiff and Randel on October 10, 2006, and entered the judgment in their favor on November 1, 2006. Plaintiff and Randel filed their motion for costs and attorney fees on January 22, 2007. Therefore, they filed their motion approximately 104 days after the trial court granted summary disposition in their favor and approximately 82 days after the trial court entered the judgment in their favor. Although the trial court did not explicitly address Zerbo Mullin's argument that the motion was untimely, the court implicitly determined that the motion was timely when it granted the motion. See *id.* at 700 n 4.

The trial court's implicit determination regarding the timeliness of the motion did not constitute an abuse of discretion. In *Maryland Cas Co, supra* at 31, this Court held that a motion for sanctions filed five months after the trial court granted summary disposition was filed within a reasonable time. Although the motion in that case was filed under MCR 2.114, the reasonableness standard also pertains to motions filed under that rule. *Id.* In addition, in *Avery, supra* at 501-503, this Court upheld an order granting costs and attorney fees to the defendant under MCL 600.2591 even though the defendant did not move for sanctions until after this Court affirmed the trial court's order granting summary disposition for the defendant. This Court reasoned that the "[p]laintiff has not shown any procedural defects that precluded the trial court from granting defendant's motion for taxation of costs and attorney fees." *Id.* at 503.

Likewise, in the instant case, Zerbo Mullin has not shown any procedural defects that precluded the trial court from granting plaintiff and Randel's motion. Plaintiff and Randel filed their motion in less time than the defendants in both *Avery* and *Maryland Cas Co*. Although Zerbo Mullin asserts that 100 days is unreasonable, it offers no reasoning supporting its assertion and does not articulate why the trial court's implicit determination of timeliness is outside the range of reasonable and principled outcomes. *Maldonado, supra* at 388. Therefore, Zerbo Mullin's timeliness argument fails.

Zerbo Mullin also challenges the trial court's substantive ruling granting costs and attorney fees in plaintiff's favor. We review for clear error a trial court's award of sanctions for filing a frivolous action. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

In support of its argument that sanctions under MCL 600.2591 were not warranted, Zerbo Mullin reasserts its arguments in Docket No. 274753 to overturn the grant of summary disposition for plaintiff and Randel. Primarily, Zerbo Mullin contends that it never agreed to a June 3, 2005, closing date and that it had until the end of 2005 to close on the purchase agreement. Although as previously discussed the documentary evidence shows that the parties agreed to close on or before June 3, 2005, and that the parties understood that the deal was

(…continued)

2.625(F). However, this Court has held that MCR 2.625(F) is inapplicable to a motion for costs and attorney fees under MCL 600.2591. *Maryland Cas Co, supra* at 30; *Avery v Demetropoulos*, 209 Mich App 500, 503; 531 NW2d 720 (1994).

"dead" thereafter, to assert that the deal was not over by June 3, 2005 was not frivolous. Certainly the evidence is against Zerbo Mullin in this case, but given the nature of the case, and the relations of the parties during negotiations on the closing date, it was not frivolous to file this action or take the position Zerbo Mullin took in its pleadings. Consequently, we hold that the trial court clearly erred in awarding attorney fees and costs in plaintiffs' favor, *Kitchen*, *supra*, and that order is reversed.

No costs, neither party having prevailed in full.

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray